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MICHAEL RODA

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1503

SEARS, ROEBUCK AND CO., ON ITS OWN BEHALF AND ON BEHALF OF OTHER CHARGING PARTIES UNDER THE NATIONAL LABOR RELATIONS ACT,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD AND EUGENE G. GOSLEE, ACTING GENERAL COUNSEL, IN HIS OWN BEHALF AND AS AGENT FOR THE NATIONAL LABOR RELATIONS BOARD,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Petitioner,

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NATIONAL LABOR RELATIONS BOARD AND EUGENE G. GOSLEE, ACTING GENERAL COUNSEL, IN HIS OWN BEHALF AND AS AGENT FOR THE NATIONAL LABOR RELATIONS BOARD,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner Sears, Roebuck and Co. (hereafter "Sears") prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this case on October 24, 1972, petition for rehearing denied by the Court *en banc* on February 6, 1973.

OPINIONS BELOW

The opinion of the Court of Appeals (App. A, *infra*, p. A1) is reported at 473 F. 2d 91. The opinion of the District Court (App. D, *infra*, p. A8) is not officially reported but is unofficially reported at 79 LRRM 2942.

JURISDICTION

The judgment of the Court of Appeals was entered on October 24, 1972. App. B, *infra*. A timely petition for rehearing was denied by the Court *en banc* on February 6, 1973 (App. C, *infra*) and this petition is filed within ninety days of that date. A motion to recall and stay mandate, predicated on the submission of this petition, is presently pending before the Court of Appeals.[1] This Court's jurisdiction is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED

1. Assuming that a district court may enjoin agency proceedings pending resolution of a request for documents under the Freedom of Information Act (5 U. S. C. § 552),[2] does an agency's violation of its statutory duty to promptly produce public documents, establish, as a matter of law, a *prima facie* showing of irreparable injury sufficient for the issuance of a preliminary injunction where the agency fails to demonstrate that the injunction will result in substantial harm to public or private interests.

2. Whether the equity powers of a federal district court, ancillary to a *de novo* proceeding under the Freedom of Infor-

1. This motion was necessitated by the parties' mutually erroneous view, which prevailed until April 13, 1973, that the petition for rehearing in the Court of Appeals had not yet been decided. It was for this reason that, subsequent to the actual denial of that petition, Sears submitted to this Court in *The Renegotiation Board* v. *Bannercraft Clothing Company*, No. 72-822, *cert. granted*, January 23, 1973, a motion *amicus curiae* to postpone consideration of that case pending determination of the petition for rehearing so that the instant case could be considered in conjunction therewith. This motion was denied by the Court on March 26, 1973. App. F, *infra*.

2. This issue, *i.e.*, "[w]hether the Freedom of Information Act authorizes the district courts to enjoin agency proceedings until the court determines whether litigants before the agency are entitled to documents sought under the Act," is currently before the Court in *Bannercraft*. Pet. for Cert. in No. 72-822, p. 2.

mation Act, are replaced by the judicial review procedures of a court of appeals, predicated on the substantial evidence test, under Section 10(f) of the National Labor Relations Act (29 U. S. C. § 160(f)).

STATUTES INVOLVED

The relevant provisions of the Freedom of Information Act, 5 U. S. C. § 552 (hereafter the "Information Act"), and the Rules and Regulations and Statements of Procedure of the National Labor Relations Board (hereafter the "Board"), 29 C. F. R. § 101.2 *et. seq.*, are set forth in Appendix G.

STATEMENT OF THE CASE

This case originally arose when District Court issued a preliminary injunction barring further Board proceedings until Sears, the charging party before the Board, had a reasonable time to analyze information already belatedly made available by the Board, and other information that the Board was expected to make available, pursuant to a proper request by Sears under the Information Act. App. D, *infra*, p. A8. The injunction was predicated, *first*, on the jurisdiction of the District Court to grant such relief in view of the absence of any "other remedy available to plaintiff" to rectify the extended delay on the part of the General Counsel in producing the requested documents, and, *second*, on the District Court's conclusion that, unless the equitable relief sought was granted, "plaintiff will suffer irreparable harm" by being deprived of the meaningful use of the requested documents. *Id.* at A9. Two judges of the Court of Appeals, however, granted summary reversal notwithstanding the intervening decision by the District Court that Sears was correct "on all points" on the merits of its Information Act claim. App. A, *infra*, p. A4, n. 4. While acknowledging that the District Court had properly asserted jurisdiction under *Bannercraft*, the two judge panel

concluded that the District Court erred in determining that Sears would be irreparably harmed by participating, absent the requested information, in the Board case. App. A, *infra*, p. A4. A petition for rehearing was denied by the Court of Appeals *en banc* on February 6, 1973. App. C, *infra*.

Sears, pursuant to Sec. 101.2 of the Board's Rules (App. G, *infra*, p. A19), had initiated the underlying Board case by filing unfair labor practice charges with the Board's Seattle, Washington Regional Director as agent for the Board's General Counsel. Since the charges raised novel legal issues, the Regional Director, in accord with agency practice,[3] referred them to the General Counsel's Advice Branch for resolution. Subsequently, based on "mandatory instructions" (App. A, *infra*, p. A2) from that Branch, the Regional Director dismissed the charges. Sears thereupon appealed this determination, pursuant to Sec. 102.19 of the Board's Rules (App. G, *infra*, p. A18), to the General Counsel's Appeals Branch. Concurrently therewith, in order to ascertain the basis for the Advice Branch decision and thereby prepare the "complete [appeal] setting forth the facts and reasons upon which it is based" as required by Sec. 102.19 of the Board's Rules, as well as effectively participate in settlement discussions and/or a hearing if complaint did issue,[4] Sears sought access

3. See Sec. 101.8 of the Board's Rules and Sec. 202.1 of the Board's Statements of Procedure, App. G, *infra*, pp. A19-20; see also Quarterly Report on Case Development by present Board General Counsel Nash, May 31, 1972, reprinted at 80 LRR 105 (1972), and the General Counsel's presentation to the House Labor Subcommittee on the National Labor Relations Board on June 29, 1961, excerpted at I CCH Labor Law Reports ¶ 1150.01 (p. 3075) ("the General Counsel's final determination is communicated to the Regional Office by way of a memorandum from the Advice Branch . . . this memorandum ordinarily recites the facts upon which the Advice Branch relied in making its determination, the exact issue involved, instructions for the final processing of the case, and a detailed legal rationale, including any pertinent Board or Court decisions").

4. See Secs. 101.9 and 101.10 of the Board's Rules, App. G, *infra*, pp. A19-20.

under the Information Act to the Advice decision in its case, related Advice and Appeals determinations and their respective indices. When three months of diligent effort to obtain such documents—during which time Sears' appeal was granted and complaint issued—proved unsuccessful, the instant action was initiated on August 4, 1971, under the Information Act, seeking both the disputed data and a stay of the underlying agency proceeding.

After, as the District Court found (App. D, *infra*, p. A8), considerable delay by the General Counsel,[5] on February 6, 1972, the General Counsel agreed to provide Sears with a portion, but not all, of the requested information. Notwithstanding that the information made available was (1) largely unindexed, requiring, for example, a search of over 8,000 documents in order to ascertain those particular decisions relevant to Sears' charge;

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5. On October 26, 1971, six months after Sears had made its first request, the General Counsel sought an extension of time to file an answer. After noting that it was General Counsel Nash's predecessor, Respondent Goslee, who had denied the requested materials to Sears, the General Counsel stated:

> . . . Peter G. Nash is now General Counsel of the National Labor Relations Board and has ordered a review of the refusal to disclose such information and *is presently disposed to believe that he will make the information available.*
> . . . The General Counsel expects that a complete and final review of the question of whether and how to make such information available will be made by the beginning of January. [Emphasis added].

Despite Sears' strenuous opposition to this request—in which it argued that a delay should only be permitted if accompanied by a guarantee that the underlying Board case would be set back substantially after Sears received access to the materials, particularly in view of the statutory mandate that "proceedings [brought under the Information Act] before the district court . . . take precedence on the docket over all other causes, and shall be assigned for hearing and trial at the earliest practicable date and expedited in every way" (5 U. S. C. § 552(a))—the court nevertheless granted the requested extension.

(2) that pertinent material, incorporated by reference, upon which the decisions relied was not made available at all; and (3) that none of the "parties to the dispute [had any] objection" (App. D, *infra.* p. A8), the General Counsel refused to extend the then-scheduled April 6, 1972 hearing date in the underlying Board case. Sears was thus denied both a reasonable opportunity to examine that information which was provided and any possibility of satisfactorily resolving, prior to a hearing in the Board case, the remaining documentary conflicts. Hence it sought and obtained the injunctive relief at issue here.

REASONS FOR GRANTING THE WRIT

A. The Decision Below Raises an Important Question of Federal Law Which Has Not Been, but Should Be, Settled by This Court

The question here presented is one that is likely to repeatedly recur in the administration of the Information Act. It is an issue which is integrally intertwined with the *Bannercraft* jurisdictional issue; it is also equally important in determining whether the "Act's requirement that production be prompt" (*National Cable Television Assn. F. C. C.*, ... F. 2d ....., n. 11 (D. C. Cir., April 17, 1973)) is a reality or a mirage. As one Congressional committee recently concluded, one of the major impediments to "the efficient operation" of the Act has been "foot-dragging" and "delay" on the part of administrative agencies and a failure to recognize that, since requested information is "likely to be a perishable commodity", any lengthy delay in providing such data "may result in substantial damages to the plaintiff's case" and render the information sought "totally useless."[6] *Bannercraft*, if resolved in accord with the Court of Appeals, would provide a potential

6. *Administration of the Freedom of Information Act*, H. R. Rep. No. 92-1419, 92d Cong. Sess. (1972), pp. 10, 74 and 82-3.

means of alleviating this problem. Equitable recourse, if limited to the peculiar irreparable injury threatened in *Bannercraft*, will be of dubious value. The instant case thus presents a crucial component of the issue raised in *Bannercraft*: what showing of irreparable injury is required to permit enjoining administrative proceedings.

The irreparable injury standard adopted by the court below would virtually restrict judicial intervention to Renegotiation Board proceedings. Equitable relief would be unavailable even where, as in this case, (1) the requested information is required to be produced under the Act, (2) such information would be "a significant help" to the requesting party in the underlying agency proceeding (App. A, *infra*, p. A4), (3) the agency has engaged in extensive procrastination (see n. 5, *supra*), and (4) there is no countervailing harm to other interests in continuing the administrative proceeding. This result, it is submitted, negates the Information Act's applicability to Board cases. It thus disregards the Act's objective of creating "a judicially enforceable public right to secure" disclosure (*E. P. A.* v. *Patsy Mink*, ... U. S. . . . ., 41 U. S. L. W. 4201, 4208 (1973)), as well as the omission of any Congressional "restriction on the Court's jurisdiction in equity" (*Porter* v. *Warner Holding Company*, 328 U. S. 395, 398 (1946)). For example, absent the District Court's action, the very reason the information here was requested would have been obfuscated and any inquiry on the merits of the request rendered a meaningless exercise. The General Counsel would have denied through delay what it could not deny directly: the effective use of the material sought. In the circumstances of this case, therefore, the use of the court's historic equitable jurisdiction was a " 'common sense solution' . . . to 'do complete justice. . . .' " *Morrow* v. *District of Columbia*, 417 F. 2d 728 (D. C. Cir. 1969). Review of the instant case is required so that this Court may resolve when and under what circumstances this "common sense solution" may be applied.

B. The Decision Below Misinterprets Decisions of This Court and Conflicts with the Decisions of Other Courts of Appeals

The Court of Appeals construed *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41 (1938), as indicating that, since "it is only in extraordinary circumstances that a court may . . . intervene to interrupt agency proceedings", the "burden of submitting to agency hearings", without relevant information properly sought under the Act, does not constitute "the type of injury to justify judicial intervention." App. A., *infra*, p. A4. This view of *Myers* is incorrect and contrary to the proper interpretation of that case rendered by other appellate decisions.

Myers held that the ordinary burden of administrative proceedings is not, in and of itself, sufficient to constitute irreparable injury. "It does not follow, however," as *Bannercraft* observed, "that the harm stemming from pending administrative proceedings can never be so great as to be 'irreparable.' " 466 F. 2d at 358. In fact, *Myers* was not intended to govern a claim of "illegal" procedure or truncated "opportunity to introduce evidence" (303 U. S. at 45), let alone a violation of an independent statutory right. *"Myers"*, as the District Court properly concluded, "is distinguishable since it involved judicial review of the . . . Board's decisional processes rather than, as here, rights under the . . . Information Act". App. D, *infra*, p. A9. Indeed, where, as in this case and *Bannercraft*, "the administrative process cannot function as it was intended to function until [there is] . . . access to the documents"—where a charging party like Sears is precluded from "effectively" performing his administrative role—then there is "the sort of clear threat to a statutory right which can easily be categorized as an impending irreparable injury." *Bannercraft*, 466 F. 2d at 356.

1. The court below, although acknowledging that the disputed documents might be of "significant help" to Sears in "its litigating stance" before the Board, declined to find that

Sears had been effectively harmed in its capacity as a charging party since "[w]hatever benefits may be derived from the documents can be developed in the proceeding by the Board ['s General Counsel]". App. A, *infra*, p. A4. This argument contravenes *International Union, UAW, Local 283* v. *Scofield*, 382 U. S. 205 (1965). The Court there recognized that the General Counsel was not contemplated as the exclusive guardian of private interests. 382 U. S. at 217, n. 7. The National Labor Relations Act interblends, as the decision below failed to appreciate, private and public interests. Accordingly, where a private party's representation of his own interest is essentially impaired, there is a fundamental procedural infirmity warranting equitable relief. Cf. e.g., *Skinner & Eddy Corp.* v. *United States*, 249 U. S. 557 (1919); and *Amos Treat & Co.* v. *S. E. C.*, 306 F. 2d 260 (D. C. Cir. 1962).

2. The court below also erred in assuming that, even if Sears were harmed in the Board proceeding, "an appropriate remedy can be fashioned by the Board, or by the court of appeals with jurisdiction of the petition for review or enforcement in the event the Board issues an order." App. A, *infra*, p. A4. *First*, as *Bannercraft* observed, "[t]he Information Act confers jurisdiction on the *District Court* to order production of appropriate documents, and there is no reason to assume that this jurisdiction was not intended to be exclusive. . . . Certainly it cannot be said that Congress intended the Board to enforce the Information Act against itself . . . The plain fact is that there *are* no administrative remedies under the Freedom of Information Act." 466 F. 2d at 358 (Emphasis the Court's). *Second*, in this case, as in *Jewel Companies, et al.* v. *F. T. C.*, 432 F. 2d 1155 (7th Cir. 1955), even if there is ultimate appellate review in a proceeding under Section 10(e) or (f) of the Labor Act, the standard of review would be totally different. The limited scope of review under Section 10(e) or (f)[7] is surely not com-

7. See, *e.g.*, *Universal Camera Corp.* v. *N. L. R. B.*, 340 U. S. 474 (1951). Cf. *Volkswagen of America* v. *Jahre*, 472 F. 2d 557 (5th Cir. 1973).

parable to that prevailing in a *de novo* proceeding in a district court under the Information Act. In contrast to *Myers*, therefore, and like *Jewel*, unless the District Court had the power to grant equitable relief here, there would be "no effective way of presenting the claim of invalidity at a later date." 432 F. 2d at 1158.

CONCLUSION

The instant case presents an important aspect of *Bannercraft* which warrants resolution by this Court in conjunction with that case. It also provides the Court with a desirable vehicle to explicate the appropriate boundaries between *Myers* and *Skinner & Eddy*. For each of these reasons, Sears prays that the petition for certiorari be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

No. 72-1425

SEARS, ROEBUCK AND CO., ON ITS OWN BEHALF AND ON BEHALF OF OTHER CHARGING PARTIES UNDER THE NATIONAL LABOR RELATIONS ACT

v.

THE NATIONAL LABOR RELATIONS BOARD AND EUGENE G. GOSLEE, ACTING GENERAL AGENT FOR THE NATIONAL LABOR RELATIONS BOARD, APPELLANTS

APPELLANTS' MOTION FOR SUMMARY REVERSAL

Decided October 24, 1972

Messrs. Glen M. Bendixsen and *Charles N. Steele* were on the motion for summary reversal for appellants.

Messrs. Lawrence M. Cohen, Jeffrey S. Goldman, Alan Raywid, and *Gerald C. Smetana,* were on the opposition to appellants' motion for summary reversal.

Before: LEVENTHAL and WILKEY, *Circuit Judges.*

Per Curiam: This case involves the propriety of judicially ordered interruption of agency proceedings pending resolution of a Freedom of Information Act claim.

Plaintiff, Sears, Roebuck & Co., charged the Retail Clerk's International Union (the Union) with violating section 8(b)(3) of the National Labor Relations Act, as amended, 29 U. S. C. § 158(b)(3) (1970). This resulted in the issuance of a complaint by the Board's General Counsel against the Union.

Prior to the issuance of the complaint, Sears requested of the Board and General Counsel certain documents known as Advice and Appeals memoranda. These documents, prepared by the General Counsel's Office in Washington, are issued in novel and significant cases to "guide" the NLRB's Regional Directors in their decisions as to when to issue complaints. The District Court found, and we accept that finding for purposes of this motion, that the memoranda are, in substance, mandatory instructions designed to govern when complaints will issue.

Even though the General Counsel issued a complaint against the Union, Sears continued to demand the Advice and Appeals memoranda. Sears puts its interest in them on its right, as a charging party, to participate in the Board's proceeding. See 29 C. F. R. § 101.10 (1972). Following refusals by the Board and General Counsel to release the memoranda, Sears filed an action in the District Court under the Freedom of Information Act, 5 U. S. C. § 552 (1970), alleging that it could not meaningfully participate in the unfair labor practice charge without the requested information. On February 3, 1972, the General Counsel announced that he would make available all Advice and Appeals memoranda in completed cases.[1] He continued to refuse to release the memoranda prepared for Sears' case against the Union (Board Case No. 19-CB-1673).

In March 1972, after an oral hearing, the District Court found that Sears would be irreparably injured by participating in the NLRB hearing without the Advice and Appeals memoranda. The Court also found that Sears had a probable right

1. This category of memoranda would include instances where complaints did not issue, and in cases where complaints did issue, cases in which Board action was complete.

to the requested documents and that the District Court had jurisdiction to enjoin the Board's proceedings. The court therefore enjoined the defendants from going forward with the unfair labor practice proceedings "until plaintiff has had a reasonable time to inspect and analyze that information which the Board has made available; to resolve any disputes with respect to the remainder of the information requested by the plaintiff, and should such, information then also be made available, to inspect and analyze such additional information." On March 29, 1972, the Board filed a notice of appeal from the injunction. It subsequently filed a motion in this court for summary reversal of the injunction. Since the filing of that motion the District Court has refused to stay its order.

The District Court was correct in its premise that there is jurisdiction to enjoin agency proceedings pending resolution of a Freedom of Information Act claim. Bannercraft Clothing Co., Inc. v. The Renegotiation Board, D. C. Cir., No. 24,685 (decided July 6, 1972). However, as *Bannercraft* itself noted, "the bare existence of jurisdiction does not mean that appellees were entitled to the relief they were granted by the District Court." Slip opin. at 15. While Myers v. Bethlehem Shipbuilding Corp., 303 U. S. 41 (1938), cannot be taken as mandating that such intervention is never warranted,[2] it still has vitality as indicating that it is only in extraordinary circumstances that a court may, in the sound exercise of discretion, intervene to interrupt agency proceedings to dispose of a single, intermediate or collateral issue. A cogent showing of irreparable harm is an indispensable condition of such intervention.

Irreparable harm cannot be established by a mere reliance on the burden of submitting to agency hearings. This is a risk of litigation that is inherent in society, and not the type of injury to justify intervention. *E.g., Myers, supra,* at 51-52.[3]

2. See, *e.g.*, cases cited in *Bannercraft, supra,* at 16, n. 7.

3. Where the expense of submitting to administrative proceedings is extraordinary, judicial intervention may be justifiable. See Public Utilities Commission of Ohio v. United Fuel Gas Co., 317 U. S. 456, 469 (1943).

In the case at bar we do not have a cogent showing, indeed we do not see a substantial showing, of how Sears will be irreparably harmed in its participation in the unfair labor practice charge without the Advice and Appeals memoranda whose disclosure is still under judicial consideration. Sears was successful in seeking the issuance by the Board of a complaint of unfair labor practice charge. Sears does not contend, nor is there any reason to believe, that the Board will not prosecute the complaint diligently and in good faith. The disputed memoranda are available to the Board. Whatever benefits may be derived from the documents can be developed in the proceedings by the Board.

It may be that Sears will be held entitled to the documents under the Information Act,[4] and it may be that its possession of those documents will be a convenience, indeed a significant help, in its litigating stance. But those considerations are of a different order from the kind of irreparable injury required to interrupt an administrative proceeding. Should Sears' claim to the memoranda be upheld on appeal and should it appear that there was significant adverse impact on Sears in the unfair labor practice charge proceedings because it was denied timely disclosure, an appropriate remedy can be fashioned by the Board, or by the court of appeals with jurisdiction of the petition for review or enforcement in the event the Board issues an order.

In our decision, we have taken note that the memoranda here requested are documents prepared to guide the Regional Directors in deciding when to issue complaints. Although the memoranda may be of some value in prosecuting a complaint, they were not designed to serve that function. This strengthens our conclusion that the case lacks the requisite showing that access to the documents is necessary to avoid irreparable harm to Sears.

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4. On August 10, 1972 the District Court issued its final order in the underlying Freedom of Information Act case. It held for Sears on all points. An appeal from that decision is pending in this court.

The motion for summary reversal is granted and the case is remanded to the District Court for disposition consistent with this opinion.

So ordered.

APPENDIX B

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

September Term 1972

SEARS, ROEBUCK AND CO., on its own behalf and on behalf of other charging parties under the National Labor Relations Act,
vs.
THE NATIONAL LABOR RELATIONS BOARD.

No. 72-1425

Appeal from the United States District Court for the District of Columbia Before Levanthal and Wilkey, Circuit Judges.

JUDGMENT

On consideration of Appellants' Motion for Summary Reversal and of the responsive pleadings filed with respect thereto, it is

ORDERED AND ADJUDGED by this Court that the Motion for Summary Reversal is granted and the case is remanded to the District Court for disposition consistent with the opinion filed herein this date.

Per Curiam
For the Court:
/s/ HUGH E. KLINE

Date: October 20, 1972.
Per Curiam.

APPENDIX C

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit
SEPTEMBER TERM, 1972

No. 72-1425

SEARS, ROEBUCK AND CO., on its own behalf and on behalf of other charging parties under the National Labor Relations Act,

vs.

THE NATIONAL LABOR RELATIONS BOARD and EUGENE G. GOSLEE, Acting General agent for the National Labor Relations Board.

Appellants

} Civil Action 1571-71

Before: BAZELON, *Chief Judge;* WRIGHT, MCGOWAN, TAMM, LEVENTHAL, ROBINSON, MACKINNON, ROBB and WILKEY, *Circuit Judges.*

ORDER

On consideration of appellee Sears, Roebuck and Company petition for rehearing, suggestion for rehearing *en banc*, or, motion to stay judgment pending disposition of case 72-1870 and of the responsive pleadings, it is

ORDERED by the Court *en banc* that the aforesaid petition, suggestion and motion are denied.

Per Curiam

APPENDIX D

UNITED STATES DISTRICT COURT
For the District of Columbia

SEARS, ROEBUCK AND CO., *Plaintiff,* *vs.* NATIONAL LABOR RELATIONS BOARD, et al., *Defendants.*	Civil Action No. 1571-71

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The plaintiffs, Sears, Roebuck and Co., is the charging party in an unfair labor practice proceeding before the National Labor Relations Board (Case No. 19-CB-1673), and, in aid of the prosecution of that charge, has sought since May, 1971, effective access, pursuant to the Freedom of Information Act, 5 U. S. C. § 552, to information relevant to said case that is in the possession of the Board.

2. That, on February 16, 1972, the Board finally made available the vast majority of the information which plaintiff desired.

3. That, notwithstanding the Board's considerable delay in providing plaintiff with access to at least a portion of the information it requested, plaintiff's subsequent difficulty in locating and identifying desired documents and the disputes which remain as to the availability of other information, the Board intends to proceed to hearing in Case No. 19-CB-1673 on April 6, 1972, notwithstanding that all parties to the dispute have no objection to an extension of the hearing date.

4. Sears now seeks a mandatory injunction to prevent the Board from proceeding in Case No. 19-CB-1673 until it has received all of the information to which it is entitled under 5 U. S. C. § 552 and has had a reasonable opportunity to analyze the same.

5. The Board relies, in opposing such an injunction, on *Sears, Roebuck and Co.* v. *N. L. R. B.*, 433 F. 2d 210 (6th Cir. 1970), which, in turn, relies on *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41 (1938). *Myers*, however, is distinguishable since it involved judicial review of the National Labor Relations Board's decisional processes rather than, as here, rights under the Freedom of Information Act.

6. In this Court's view, the controlling decisions are *Deering-Milliken* v. *Johnson*, 296 F. 2d 856 (4th Cir. 1961), involving an analogous provision of the Administrative Procedure Act, 5 U. S. C. § 1009(b), in which the district court was found to have power to enjoin the Board, and *Bristol-Myers Co.* v. *F. T. C.*, 424 F. 2d 935 (D. C. Cir. 1970), in which this Court of Appeals in dictum indicated that, upon a showing of irreparable injury (such as that caused by agency delay in making available information required to be provided under the Freedom of Information Act), a court may enjoin agency proceedings.

7. The plaintiff has demonstrated a probable right under the Freedom of Information Act to the information it desires; that unless the motion for preliminary injunction is granted, plaintiff will suffer irreparable harm; and that there will be no harm to the other parties in Case No. 19-CB-1673 by reason of the grant of a preliminary injunction.

8. That this Court has jurisdiction to provide the equitable relief sought herein and that there is no other adequate remedy available to plaintiff.

/s/ H. J. Corcoran
Judge

Dated: March 27, 1972

APPENDIX E

UNITED STATES DISTRICT COURT

For the District of Columbia

SEARS, ROEBUCK AND CO., on its own behalf and on behalf of other charging parties under the National Labor Relations Act, *Plaintiff,* *vs.* NATIONAL LABOR RELATIONS BOARD and EUGENE G. GOSLEE, Acting General Counsel, in his own behalf and as agent for the National Labor Relations Board, *Defendants.*	Civil Action No. 1571-71

MEMORANDUM AND ORDER

This cause is before the Court on cross motions for summary judgment.

Plaintiff[1] Sears, Roebuck and Co. (hereinafter Sears) is a "charging party" before the National Labor Relations Board, (Board Case No. 19-CB-1673), and seeks access, pursuant to the Freedom of Information Act (hereinafter the Act), 5 U. S. C. § 552, to certain documents issued by the Office of the General

1. Plaintiff argues that it is a proper class representative and may therefore seek relief on behalf of a class of charging parties before the National Labor Relations Board. Since whatever relief this Court chooses to grant the plaintiff will necessarily be binding on the defendants as to all persons, the Court need not and does not address this issue.

Counsel of the Board, commonly referred to as Advice and Appeals memoranda, and certain other materials incorporated by reference therein.

The Act grants this Court jurisdiction "to enjoin the defendants from withholding agency records" prospectively in addition to "order[ing] the production of any Agency records improperly withheld" from a complainant. 5 U. S. C. § 552(a)(3).

Defendants have historically maintained a uniform policy of withholding the sought-after documents, and, although a portion of the memoranda have been made available by defendants to the public during the pendency of this case,[2] the defendants maintain that this revelation reflects a voluntary change of policy and is not required by the Act. Defendants also refuse to make available documents incorporated by reference in said memoranda, and have deleted from the documents made available such matter as the names of parties, the names of attorneys and citations to prior Advice and Appeals memoranda.

The controversy giving birth to this action[3] arose between the plaintiff and the Retail Clerk's International Union (hereinafter "Union") in April, 1971. The plaintiff charged the Union with violating Section 8(b)(3) of the National Labor Relations Act (hereinafter, N. L. R. A.). As required by N. L. R. A. plaintiff Sears filed its charge with the Regional Director of the Nineteenth Region of the National Labor Relations Board in Butte, Montana (hereinafter, Regional Director). The objective of the plaintiff in bringing its charge to the Regional Director was to obtain the issuance of a complaint against the Union.

2. On February 3, 1972 the General Counsel announced that, while he still considered the Advice and Appeals memoranda protected by the Freedom of Information Act, he would make available all Advice and Appeals memoranda when the case involved was completed.

3. In related proceedings this Court issued a preliminary injunction on March 17, 1972 staying proceedings in Board Case No. 19-CB-1673 until records which the Board made available to the plaintiff (only after substantial delay) could be examined by the plaintiff for use in that case before the Board.

Under the provisions of the N. L. R. A. the final authority to issue such a complaint is vested in the office of the Board's General Counsel 29 U. S. C. § 153(d)[4]. The General Counsel has in turn delegated the initial power to determine whether a complaint should be issued to the Regional Directors. National Labor Relations Board, Organization and Functions, Section 203.1, 32 F. R. 9588. Board Statements of Procedure, Sec. 101.4, 29 C. F. R. Sec. 101.4.

To promote uniformity in the administration of the Act, the General Counsel required that Regional Directors when faced with requests that raise "novel" problems, submit a description of the request to the General Counsel's Office in Washington for "Advice" as to disposition. Statements of Procedure Sec. 101.8. The ostensible purpose behind this procedure is to insure that new questions arising in the field of labor relations be handled in substantially the same manner in all parts of the country. In this way Advice memoranda are issued in all the novel and significant cases brought by charging parties. After extensive centralized consideration the Advice branch of the Office of the General Counsel issues these memoranda containing its final conclusions to the regional directors, who regularly implement these memoranda by issuing or refusing to issue complaints as "advised" by the Advice Branch.

Defendants claim that these memoranda include a diversity of information including settlement suggestions. However, careful examination of the procedure reveals that the net effect of an Advice memorandum is to truncate the delegated authority of a Regional Director to the point where his issuance of a complaint or refusal to do so is merely a ministerial function. Far from being recommendations, although ancillary recommendations may be contained therein, Advice memoranda are instructions mandatory in substance if not in form. As such,

4. The General Counsel concedes that in the performance of his pre-complaint prosecutorial authority, he is clearly an agency within the meaning of 5 U. S. C. § 551(1).

they constitute "instructions to Staff that affect a member of the public." 5 U. S. C. § 552(a)(2)(c).

When a regional director fails to issue a complaint, either pursuant to the recommendation of the Advice Branch, or independently in a case not referred to the Advice Branch, the charging party may move the Office of the General Counsel to reconsider the decision by seeking relief from the Office of Appeals. Statements of Procedure, Sec. 101.6. The conclusions of the Office of Appeals have traditionally been summarized in memoranda called the "General Counsel's Minute." Plaintiff does not seek access to these documents.

Thereafter the General Counsel either sustains the refusal to proceed or orders the Regional Director to issue the complaint. Additionally the Office of Appeals prepares a second memorandum—the "agenda minute"—which provides an analysis of the decision and which is sent to the Regional Director. It is access to this second group of appeals memoranda that plaintiff seeks.

Letters containing only the result, though not necessarily the underlying rationale, were sent to the parties previously in this action. During the pendency of this action a new policy has been instituted by the General Counsel whereby a portion of the information found previously only in the agenda minutes is included in these letters.

The Action of the General Counsel's office on appeals of the refusal of Regional Directors to issue complaints, whether made pursuant to "advice" from the Counsel office or otherwise is clearly final. This is not a preliminary view or a record of advocacy and debate, it is a final determination of the General Counsel's staff of the disposition of a charge. It is not an expression of a point of view, it is the disposition of a charge. As such the Appeals memorandum lies outside the Act's § (b)(5) exemption. Congress intended by that exemption only to promote the "free flow of information" *Ackerly* v. *Ley*, 420 F. 2d 1336, 1341 (D. C. Cir. 1969), and did not "design

[it] to facilitate the easy exchange of substantive declarations of policy. Indeed if it were, the exemption would have clearly engulfed the rule." *Sterling Drug* v. *F. T. C.*, 450 F. 2d 698, 713 (D. C. Cir. 1971) Bazelon J. dissenting in part. *See also*, Davis, "The Information Act: A Preliminary Analysis," 34 Chicago Law Rev. 761. Since the memoranda lie outside the exemption, they *must* be disclosed. *Tennessean Newspapers* v. *F. H. A.* .... F. 2d .... (6th Cir., May 4, 1972); *Getman* v. *N. L. R. B.*, 450 F. 2d 670, 672 (D. C. Cir. 1971).

It follows, further, that documents incorporated by reference in Advice and Appeals memoranda, even though possibly qualified for a Sec. (b) exemption taken separately, must also be disclosed, since they have lost their exempt status by incorporation. *American Mail Line Ltd.* v. *Gulick*, 411 F. 2d 696, 703 (D. C. Cir. 1968).

Upon consideration of the undisputed facts and after examining examples of the requested memoranda, this Court concludes: (a) that the Advice and Appeals memoranda are not "intra-agency memorandums" within the meaning of § 552(b)(5) of the Act; (b) that the Advice memoranda are "instructions" which affect a member of the public within the meaning of the Act; (c) that the Appeals memoranda issued in cases still pending, including those issued in Board Case No. 19-CB-1673, are "final opinions" within the meaning of the Act (d) that documents expressly incorporated by reference are in fact part of said memoranda; (e) that in cases where the aforesaid memoranda rely upon and make reference to the "circumstances of the case" without delineating these "circumstances" the General Counsel must produce explanatory material including documents unless the General Counsel demonstrates such documents to be exempt; (f) that the Advice and Appeals memoranda made available shall include the names of the parties, the names of the attorneys, citations to prior cases and all other information for which justification for deletion has not been explained fully in writing except the names of affiants, and settlement

suggestions from the Office of the General Counsel to the regional directors; and (g) that, the Act requires that the Advice and Appeals memoranda issued since July 4, 1967 be indexed and such indices be made available to the public.

Accordingly, the court concludes that the plaintiff's motion for summary judgment should be granted and the defendant's motion for summary judgment be denied. It is So Ordered and further Ordered that

(1) that defendants promptly make available to the public all Appeals and Advice memoranda issued since July 4, 1967, and any document expressly incorporated therein by reference;

(2) that defendants with reasonable promptness produce and compile, if necessary, indices of said memoranda;

(3) that defendants produce explanatory material including existing documents in those instances where Advice or Appeals memoranda rely upon the "circumstances of the case" or some other vague and imprecise reference without delineating what those circumstances are except where they can demonstrate that these documents are exempt under the Act;

(4) that defendants cease and desist from deleting from said Appeals and Advice materials the names of parties, the names of attorneys, citations to prior cases and all other information for which a justification for deletion has not been explained fully in writing except settlement suggestions from the Office of the General Counsel and the names of affiants.

/s/ H. J. Corcoran

Judge

Dated: August 10, 1972.

APPENDIX F

SUPREME COURT OF THE UNITED STATES
Office of the Clerk
Washington, D. C. 20543

March 26, 1973

Hon. Erwin N. Griswold
Solicitor General of the United States
Dept. of Justice
Washington, D. C. 20530

RE: Renegotiation Board v. Bannercraft
Clothing Co., Inc., Et Al., 72-822

Dear Sir:

The Court today entered the following order in the above-entitled case:

> The motion of Sears, Roebuck & Co. for leave to file a brief, as *amicus curiae*, is granted. The motion of Sears, Roebuck & Co. for leave to postpone oral argument is denied. Mr. Justice Powell took no part in the consideration or decision of these motions.

[Parties Served]

Michael Rodak, Jr.,
Clerk

By /s/ Helen Taylor
Helen Taylor, (Mrs.)
Assistant Clerk

APPENDIX G

The Public Information Act, 5 U. S. C. § 552, provides in relevant part:

5 U. S. C. 552(a)(2):

> Each agency, in accordance with published rules, shall make available for public inspection and copying—
>
> (A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;
>
> (B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register; and
>
> (C) administrative staff manuals and instructions to staff that affect a member of the public; unless the materials are promptly published and copies offered for sale. * * * A final order opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used or cited as precedent by an agency against a party other than an agency only if—
>
> (i) it has been indexed and either made available or published as provided by this paragraph;
>
> (ii) the party has actual and timely notice of the terms thereof.

5 U. S. C. 552(a)(3):

> Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, or request for identifiable records * * * shall make the records promptly available to any person. On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, agency records or to order the production of any agency has jurisdiction to enjoin the agency from withholding

records improperly withheld from the complainant. In such a case the court shall determine the matter de novo and the burden is on the agency to sustain its action. In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member.

The Rules and Regulations and Statements of Procedure of the National Labor Relations Board, 29 C. F. R. 101.2 *et seq.*, provide in relevant part:

Sec. 102.8:

Party.—The term "party" as used herein shall mean * * * any person named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in any Board proceeding, including, without limitation, any person filing a charge or petition under the act * * * but nothing herein shall be construed to prevent the Board or its designated agent from limiting any party to participate in the proceedings to the extent of his interest only.

Sec. 102.19:

Appeal to the general counsel from refusal to issue or reissue.—(a) If, after the charge has been filed, the regional director declines to issue a complaint, or having withdrawn a complaint pursuant to section 102.18, refuses to reissue it, shall so advise the parties in writing, accompanied by a simple statement of the procedural or other grounds for his action. The person making the charge may obtain a review of such action by filing an appeal with the general counsel in Washington, D. C., and filing a copy of the appeal with the regional director, within 10 days from the service of the notice of such refusal to issue or reissue by the regional director, except as a shorter period is provided by section 102.81. * * * The appeal shall contain a complete statement setting forth the facts and reasons upon which it is based. * * *

* * * * *

(c) The general counsel may sustain the regional director's refusal to issue or reissue a complaint, stating the grounds of his affirmance, or may direct the regional director to take further action; the general counsel's decision shall be served on all the parties. * * *

Sec. 101.2:

Initiation of unfair labor practice cases.—The investigation of an alleged violation of the National Labor Relations Act is initiated by the filing of a charge, which must be in writing and signed, and must either be notarized or must contain a declaration by the person signing it, under the penalties of the Criminal Code, that its contents are true and correct to the best of his knowledge and belief. The charge is filed with the regional director for the region in which the alleged violations have occurred or are occurring. * * *

Sec. 101.8:

Complaints.—If the charge appears to have merit and efforts to dispose of it by informal adjustment are unsuccessful, the regional director institutes formal action by issuance of a complaint and notice of hearing. In certain types of cases, involving novel and complex issues, the regional director, at the discretion of the general counsel, must submit the case for advice from the general counsel before issuing complaint. * * *

Sec. 101.9.

Settlement after issuance of complaint.—(a) Even though formal proceedings have begun, the parties again have full opportunity at every stage to dispose of the case by amicable adjustment and in compliance with the law. Thus, after the complaint has been issued and a hearing scheduled or even begun, the attorney in charge of the case and the regional director afford all parties every opportunity for the submission and consideration of facts, argument, offers of settlement, or proposals of adjustment, except where time, the nature of the proceeding, and the public interest do not permit.

Sec. 101.10:

Hearings.—(a) Except in extraordinary situations the hearing is open to the public and usually conducted in the

region where the charge originated. A duly designated trial examiner presides over the hearing. The Government's case is conducted by an attorney attached to the Board's regional office, who has the responsibility of presenting the evidence in support of the complaint. The rules of evidence applicable in the district courts of the United States under the Rules of Civil Procedure adopted by the Supreme Court are, so far as practicable, controlling. Counsel for the general counsel, all parties to the proceeding, and the trial examiner have the power to call, examine, and cross examine witnesses and to introduce evidence into the record. They may also submit briefs, engage in oral argument, and submit proposed findings and conclusions to the trial examiner. * * *

Sec. 202.1.1:

The Division of Operations. The Associate General Counsel for the Division of Operations is responsible for the effective operation and administration of the regional, subregional, and resident offices of the agency—including the prompt and adequate investigation of all complaint cases before formal action; preparation of cases for trial; and, absent settlement, the trial of those cases. * * * He directs the activities of regional directors and supervises the regional offices for the General Counsel, through several assistant general counsels and their deputies. Under his supervision, the Advice Branch reviews regional offices' requests for advice and formulates policy on novel or unsettled procedural and substantive matters arising in unfair labor practice cases.

Sec. 202.1.2:

The Division of Litigation. The Office of Appeals is another part of the Division of Litigation. This office reviews appeals from regional directors' refusals to issue complaints in unfair labor practice cases and recommends the action to be taken thereon by the General Counsel. Pursuant to request, the director of the office also hears informal oral presentations in Washington of argument by counsel or other representatives of the parties in support of, or in opposition to, the appeals.

SUPRE

No. 72-1503

MICHAEL RODAK, JR., CLE

In the Supreme Court of the United States

OCTOBER TERM, 1972

SEARS, ROEBUCK AND CO., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

PETER G. NASH,
General Counsel,
National Labor Relations Board,
Washington, D.C. 20570.

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1503

SEARS, ROEBUCK AND CO., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

---

1. Petitioner ("Sears") brought this suit in the district court to enjoin the Board's General Counsel from conducting a hearing on an unfair labor practice complaint which had issued based on charges filed by Sears. Sears contended that the General Counsel's refusal to grant its request for certain "Advice and Appeals memoranda" which are prepared by the General Counsel's Office in Washington to guide the Board's Regional Offices in their decisions as to when to issue complaints was contrary to the Freedom of Information Act, 5 U.S.C. 552, and that Sears would be irreparably injured by participating in the scheduled hearing without

these memoranda.[1] The district court issued the injunction requested by Sears (Pet. App. A8-A9).

The court of appeals summarily reversed (Pet. App. A1-A5). It agreed with the district court that there is jurisdiction to enjoin agency proceedings pending resolution of a Freedom-of-Information-Act claim, but it held that such jurisdiction had been improperly exercised here, since "we do not have a cogent showing, indeed we do not see a substantial showing, of how Sears will be irreparably harmed in its participation in the unfair labor practice charge without the Advice and Appeals memoranda whose disclosure is still under judicial consideration" (Pet. App. A4). Sears' petition for rehearing, and for a stay of the judgment, was denied by the court of appeals *en banc* (Pet. App. A7).[2]

2. Sears' basic contention is that the withholding of information by an agency in violation of the Freedom of Information Act results in such irreparable injury that the agency proceeding must be enjoined until the information is furnished, even though there are other

---

[1] In addition to the present injunction suit, Sears brought an action in the district court under the Freedom of Information Act, 5 U.S.C. 552(a)(3), to compel production of the requested Advice and Appeals memoranda. The district court ruled in Sears' favor (Pet. App. A10-A15); that case is now before the court of appeals on the Board's appeal (Pet. App. A4, n. 4).

[2] On May 17, 1973, the Chief Justice denied Sears' application for a stay of mandate pending disposition of the petition for certiorari, without prejudice to the renewed motion for a stay which Sears, alternatively, had filed with the court of appeals. The same day the court of appeals, although acknowledging that a stay was "contrary to fundamental principle and the public interest in expeditious disposition by the Board, and without real likelihood of necessity to protect [Sears] from irreparable injury," granted a stay until this Court ruled on the petition for certiorari or recessed for the summer, whichever first occurred.

adequate means for redressing that wrong. Even assuming, contrary to the government's position in *The Renegotiation Board* v. *Bannercraft Clothing Co., Inc.*, No. 72-822, that the Freedom of Information Act authorizes the district court to enjoin agency proceedings as a means of enforcing that Act, the court of appeals correctly concluded that that Act does not override the settled principle of *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, that "it is only in extraordinary circumstances that a court may, in the sound exercise of discretion, intervene to interrupt agency proceedings to dispose of a single, intermediate or collateral issue" (Pet. App. A3).

The court of appeals correctly held that no showing of "extraordinary circumstances" was made here. As the court stated (Pet. App. A4): "It may be that Sears will be held entitled to the documents under the Information Act, and it may be that its possession of those documents will be a convenience, indeed a significant help, in its litigating stance. But those considerations are of a different order from the kind of irreparable injury required to interrupt an administrative proceeding." See *Myers* v. *Bethlehem Shipbuilding Corp., supra,* 303 U.S. at 51-52. For, the court added (*ibid.*): "Should Sears' claim to the memoranda be upheld on appeal and should it appear that there was significant adverse impact on Sears in the unfair labor practice charge proceedings because it was denied timely disclosure, an appropriate remedy can be fashioned by the Board, or by the court of appeals with jurisdiction of the petition for review or enforcement in the event the Board issues an order."[3]

---

[3] Section 10(e) and (f) of the National Labor Relations Act, 29 U.S.C. 160(e) and (f), provides for review of final Board orders in the courts of appeals.

Finally, the holding of the court below that the judicial review procedures of the National Labor Relations Act (n. 3, *supra*) adequately protect a person against prejudice resulting from a denial of material which he may be entitled to under the Freedom of Information Act accords with the decision of the only other court that has considered the question. *Sears Roebuck and Co.* v. *National Labor Relations Board,* 433 F. 2d 210 (C.A. 6). See, also, *Vapor Blast Manufacturing Company* v. *Madden,* 280 F. 2d 205, 209 (C.A. 7); *Chicago Automobile Trade Association* v. *Madden,* 328 F. 2d 766, 768-770 (C.A. 7); *Polymers, Inc.* v. *National Labor Relations Board,* 414 F. 2d 999, 1005-1006 (C.A. 2), certiorari denied, 396 U.S. 1010.

3. Contrary to Sears' contention (Pet. 7), the instant case does not present "a crucial component of the issue raised in" *The Renegotiation Board* v. *Bannercraft Clothing Co., Inc.,* No. 72-822. As shown (*supra,* p. 3), the basic issue in *Bannercraft* is whether the Freedom of Information Act authorizes a district court to enjoin agency proceedings as a means of enforcing a claim for documents made by litigants before the agency. Even if this Court were to conclude, as did the court below (Pet. App. A3), that the district courts have such jurisdiction, the denial of relief here would still be proper. For, as the court of appeals stated, this "case lacks the requisite showing that access to the documents is necessary to avoid irreparable harm to Sears" (Pet. App. A4).

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

PETER G. NASH,
General Counsel,
National Labor Relations Board.

MAY 1973.

DOJ-05-1973

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1503

SEARS, ROEBUCK AND CO., on Its Own Behalf and on Behalf of Other Charging Parties Under the National Labor Relations Act,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD and EUGENE G. GOSLEE, Acting General Counsel, in His Own Behalf and as Agent for the NATIONAL LABOR RELATIONS BOARD,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF ON BEHALF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AS AMICUS CURIAE, IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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WILSON - EPES PRINTING CO., INC. - RE 7-6002 - WASHINGTON, D. C. 20001

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1503

SEARS, ROEBUCK AND CO., on Its Own Behalf and on Behalf of Other Charging Parties Under the National Labor Relations Act,

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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF ON BEHALF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AS AMICUS CURIAE, IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI *

INTEREST OF THE CHAMBER

The Chamber of Commerce of the United States is a federation consisting of membership of over thirty-seven

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* Pursuant to Rule 42(2) of the Rules of this Court, the written consents of the parties to this case have been obtained and will be lodged with the Clerk of the Court.

hundred (3700) state and local chambers of commerce and professional and trade associations, a direct business membership in excess of thirty-eight thousand (38,000), and an underlying membership of approximately five million (5,000,000) business firms and individuals. It is the largest association of business and professional organizations in the United States.

In order to represent its members' views on questions of importance to their vital interests and to render such assistance as it can to courts' deliberations in such areas, the Chamber has frequently participated as *amicus curiae* in a wide range of significant labor relations matters before this Court. *E.g., N. L. R. B.* v. *The Boeing Company, et al.*, —— U.S. ——, Nos. 71-1417, 1607; *N. L. R. B.* v. *International Van Lines*, —— U.S. ——, No. 71-895; *N. L. R. B.* v. *Granite State Joint Board*, —— U.S. ——, 34 L. Ed. 2d 422 (1972); *N. L. R. B.* v. *Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971); *Boy's Markets* v. *Retail Clerks Union*, 398 U.S. 235 (1970); *N. L. R. B.* v. *Burns International Security Services, Inc.*, —— U.S. ——, 80 LRRM 2225 (1972); *H. K. Porter Co.* v. *N. L. R. B.*, 397 U.S. 99 (1970); *Sears Roebuck and Co.* v. *Carpet Layers, Local 419*, 397 U.S. 655 (1970); and *Los Angeles Herald Examiner* v. *Kennedy*, 400 U.S. 3 (1970).

The instant proceeding is of particular concern to the Chamber's members, as well as to employers generally. In issue is the question of when an administrative agency's proceedings can be enjoined if the agency has breached an independent statutory duty owed to those participating in the proceeding. Specifically, the case raises the related issues of (1) whether an administrative agency's failure to promptly produce information subject to disclosure under the Freedom of Information Act (5 U.S.C. § 552) constitutes, as a matter of law, the *prima facie* showing of irreparable injury necessary to warrant issuance of

a preliminary injunction by a district court enjoining an agency proceeding pending resolution of the request for information under the Information Act; and (2) whether the judicial review procedures under § 10(e) or (f) of the National Labor Relations Act (29 U.S.C. § 160(e) (f)) preclude exercise by a district court of its equity powers to enjoin an agency proceeding pending that court's resolution of the disputed request for information.

These issues are of practical significance to the Chamber and its members in that employers, both as charged and charging parties before the National Labor Relations Board, have been denied access to certain information subject to disclosure under the Freedom of Information Act. Absent injunctive relief by the district court, the NLRB would be able to accomplish by delay what it may not lawfully do directly; that is, by engaging in foot-dragging, the Board can delay disclosure of information subject to the Information Act until its usefulness in the underlying agency proceeding has long since expired. This practice has resulted in, and will continue to subject employers to, irreparable injury not adequately remedied under § 10(e) or (f) of the N.L.R.A.

REASONS FOR GRANTING THE WRIT

A. THE PENDENCY IN THIS COURT OF A RELATED AND INTERTWINED ISSUE

The area of law with which the instant petition is concerned relates to an aggrieved party's right to enjoin administrative proceedings in which the agency has committed a breach of its statutory duties causing injury to the aggrieved party's rights and interests. This Court has signified its concern for the importance of this area of law by granting certiorari, on January 23, 1973, in *Renegotiation Board* v. *Bannercraft Clothing Corp.*, No. 72-822. *Bannercraft* presents the question as to whether

courts may enjoin administrative proceedings pending the agency's compliance with its affirmative obligations under the Freedom of Information Act, 5 U.S.C. § 552. The instant case presents the question as to what an aggrieved party need establish to render himself entitled to such an injunction. As a matter logic, the two cases should be decided together in order for the decisional law which emerges to afford any meaningful guidance. While it is true that the adjudication of the second question becomes irrelevant if it is decided in *Bannercraft* that courts may not grant such injunctions, however, it is essential to note that the lower courts, both in *Bannercraft* and in the instant case, held that courts did have such authority. In determining whether to grant the petition for certiorari in this case, therefore, the likelihood of an affirmmance of the *Bannercraft* decision should be assumed. Under those circumstances, a resolution of the issue posed in this case is essential if any clarification in the area is to result. For of what practical consequence is a decision that injunctions of agency proceedings may be secured, if the circumstances under which this may be done remain shrouded in legal confusion? Finally, as is usually true when related questions are being considered, each contributes to the fullest understanding of the merits of the other. Thus, for example, an analysis of the nature of the circumstances in which it would be appropriate to secure injunctive relief against agency proceedings should aid in determining whether such injunctions should ever be permitted at all.

However, even independent of the pendency of the related *Bannercraft* case, the instant petition should be granted by the Court in view of its significance in the proper development of administrative law. The decision below, holding that Sears was not entitled to secure an injunction of NLRB proceedings, despite the Board's breach of its disclosure duties under the Freedom of In-

formation Act, because Sears failed to demonstrate it would otherwise suffer "irreparable harm", should be reversed. Reversal is warranted for the following reasons, in addition to those other factors previously cited by Sears in its petition for writ of certiorari.

B. A PARTY AGGRIEVED BY AN AGENCY'S UNLAWFUL CONDUCT SHOULD NOT BE REQUIRED AFFIRMATIVELY TO DEMONSTRATE ADDITIONAL "IRREPARABLE HARM" BEFORE BECOMING ENTITLED TO ENJOIN SUCH TAINTED AGENCY PROCEEDINGS.

The importance to litigants before the Board of the official documents which were requested and denied here, —an essential element to an entitlement to injunctive relief pending their disclosure,—derives from the nature of the law-making functions of the agency.

The agency is composed of two separate bodies, the General Counsel's Office and the Board itself. The former is charged with the duties, in general, to investigate charges that the law was violated, to decide whether those charges have merit, to determine whether to issue a formal complaint or otherwise to seek a remedy for alleged unlawful conduct and, where merit to such charges is found, either to prosecute those cases in a formal hearing or to settle them without hearing. The Board's role is restricted to a review of decisions which are rendered when complaints are issued and prosecuted by the General Counsel or to a review of the terms of settlement agreements approved by his office in lieu of proceeding to formal hearing.[1] The Board can only act, therefore, in those cases in which the General Counsel elects to

[1] This discussion omits reference to representation matters arising under Section 9 of the Act, which are not pertinent here, and is restricted to unfair labor practice cases arising under Sections 8 and 10.

proceed and only with respect to those issues and theories framed by the pleadings issued by the General Counsel's Office.

Whereas the Board's decisions are published, providing a body of law to guide parties' conduct, the deliberations of the General Counsel are not.[2] Yet the unpublished decisions of the General Counsel constitutes an entire body of law, uniformly directed to and applied by all the Regional offices throughout the country, and having as great an impact upon the interests of those subject to the Board's jurisdiction as do the decisions of the Board itself.

Moreover, the General Counsel's judgment as to whether specific conduct violates the law, as to what theories or questions should be litigated and the reasons therefore, and what relief is (and, conversely, is not) appropriate are all unreviewable conclusions.[3] Under Section 3(d) of the Act, the General Counsel is conferred

> ". . . final authority on behalf of the Board, in respect to the investigation of charges and issuance of complaints under Section 10, and in respect to the prosecution of such complaints before the Board, . . ."

Thus, it is quite literally true that with respect to many important substantive questions there exists an unreviewable and secret body of law which controls the rights and the welfare of all parties before the Board.[4] This

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[2] On a quarterly basis the General Counsel does publish a summary of a few cases which he deems to be of unusual interest. Of the hundreds of other cases coming within his jurisdiction nothing is published, not even a subject matter index.

[3] *Hourihan* v. *NLRB*, 201 F.2d 187 (CA DC, 1953), cert. den. 345 U.S. 930; *Vaca* v. *Sipes*, 386 U.S. 171, 182 (1967); *Terminal Freight Cooperative Assn., et. al.* v. *NLRB*, 447 F.2d 1099 (CA3, 1971), reh. den. 461 F.2d 777, cert. den. 81 LRRM 2894.

[4] As a measure of the effect of the General Counsel's current practice of non-disclosure of documents containing an analysis

body of law is codified in two types of documents, the so-called Advice and Appeals memoranda, which consist of the following:

Advice Memoranda: These constitute the General Counsel's analysis and directions to its Regional Directors, following the Directors' investigation of the facts pertaining to a given charge alleging unlawful conduct, as to whether a violation of law has occurred, whether a remedy should be sought, whether a formal complaint should issue, which theories and facts should be relied upon, what law governs in the area involved and what relief should or may be sought. Conversely, this analysis also reveals the basis, where appropriate, for declining to seek relief, totally or in part, and the rationale for declining to exercise other requested or available options.

Appeals Memoranda: Following the Regional Director's determination that a charge, or portions of a charge, lack merit and his consequent refusal to proceed (he may make this judgment either unilaterally or pursuant to an Advice memorandum if one was sought), the aggrieved party may seek review of that decision from the General Counsel's Office of Appeals. The decision issued by Appeals constitutes the final and ultimate agency action concerning the General Counsel's conduct, including the judgment of his Advice Branch, with respect to the issuance of complaint, settlement of cases before such issuance, and the theoretical, legal and factual components of his decisions.

It is these memoranda which Sears, the charging party in the instant case, has unsuccessfully sought from the

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of his judgments and conclusions, the Board itself is unaware of the contents of these documents and cannot address itself to those contents while performing its reviewing and adjudicating functions. The contrary assertion by the court below (app. 4-5) is simply incorrect.

General Counsel under the Freedom of Information Act. The General Counsel's refusal to make them available has, in turn, given rise to an effort to enjoin his further proceedings in this case, pending their submission.[5] As the District Court concluded below, in a finding which

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[5] Sears has pursued this case not merely for the significance of the issue here presented, but because the information which has been sought in the Advice and Appeals Memoranda is of particular substantive importance. The General Counsel has formulated rules covering the area of law involved and, through the dissemination of these memoranda throughout the country, uniformly applies these rules which, thus, become a secret body of substantive law. More specifically, in the underlying administrative proceeding there is presented an issue of first impression which is basic to the very structure of each of thousands of multi-employer bargaining units across the nation: When does collective bargaining commence, as a matter of law, and, as a corollary, at what point is a party precluded from withdrawing from an otherwise voluntary multi-party bargaining relationship. The memoranda sought by Sears over approximately the last two years contain the only existing agency law on this important and recurring issue. The significance of these materials, thus, cannot be minimized. In fact, even the Respondent-Union, in recognition of the importance of these materials, has not objected to continuing the underlying hearing for it, too, seeks to gain access to this body's secret law. In contrast to the national importance of the substantive issues to be resolved in the underlying case, and to the public interest in assuring that any decision is formulated most consistently with the national welfare, the General Counsel has never proposed a single reason why the underlying hearing must go forward without the parties' possession or use of the sought-after documents. On the contrary, there is every reason for doing the opposite. Not only these parties, but all prospective parties before the Board, should be made aware of the rules and conclusions which should guide their conduct and govern the results of their disputes. It is not enough that the agents of the Board be aware of this information and that this body of learning be restricted either wholly or in part to them. The fairest, wisest rules of law will be forged when they can be fully debated by those whom they will affect. The challenged practice insulates what should be openly analyzed and litigated. To the extent that this can be prevented only through injunction of Board proceedings pending such disclosure, that is an appropriate and necessary means for doing so and for enforcing obedience to the Congressional will as expressed in the Freedom of Information Act.

was not disturbed on appeal, by virtue of the powers and duties conferred on the General Counsel by the Labor Act, his Office functions as a separate administrative agency, distinct from the Board, at least for purposes of disclosure under the Information Act. The described Memoranda constitute the final decisions of that separate administrative agency.

Under these circumstances, where an administrative agency charged with a statutory duty of disclosure refuses to make available documents constituting its final decisions in the case to those whose vital interests are not merely affected by but, moreover, are largely resolved by them, such unlawful non-disclosure should be *presumed* to constitute the requisite injury warranting injunctive relief pending the agency's compliance with its statutory duties of disclosure under the Information Act.

The justification for this presumption flows from several sources:

First, without an opportunity to examine the contents of the subject documents, the party requesting them,—who is a full and formal party to the proceedings,—cannot and should not be expected to establish that the non-disclosure of their specific substantive contents works "irreparable" harm to its interests or to the effective prosecution of its case before the Board.

Second, the nature of those documents is such that it is inevitable that their non-disclosure will often work substantial injury to the parties' rights. For example, where the General Counsel takes some action adverse to a charging parties' interests in reliance upon the contents of an Advice memorandum, absent its disclosure the charging parties are unable to make an effective appeal to the Office of Appeals; they cannot be expected to intuit the range of arguments, theories and authorities advanced by the Advice section and may thus pro-

ceed on parallel rather than intersecting lines to the Office of Appeals. Further, absent disclosure of the Appeals memoranda, should those be adverse, the charging party would be unable to pursue entirely legitimate avenues to the courts to protest possible General Counsel abuse of discretion or failure to adhere to his statutory obligations,[6] the predicate for which may emerge only from a reading of the full analysis prepared by the Office of Appeals. Moreover, the non-disclosure of these memoranda will frequently prejudice the presentation of the charging party's case should the matter go to formal hearing. Thus, for example, the General Counsel's agents may misinterpret the contents of the documents; they may not be skillful or alert to the full potential of the material contained therein; they may not understand or foresee the implications of the material, where those implications may have greater significance to the charging party's ultimate welfare than the immediate principles discussed; and, for whatever reasons, they may not follow the directions or instructions contained in those memoranda. Finally, in this connection, differences in emphases may well yield differences in results; the independent judgment of the charging party applied to the contents of these documents could very conceivably produce a successful result not otherwise obtainable. Absent full disclosure of the memoranda, the primary party to the proceeding,—the party aggrieved by the charged violation of law,—would have no opportunity to maximize its litigation posture or to protect its rights and interests from the deliberate or unintentioned adverse acts of others with respect to information and conclusions of which it would be unaware.

Third, such injury to the interests of the parties as would result from an agency's improper refusal promptly to disclose information is inherently irreparable. Even

[6] *Leedom* v. *Kyne*, 358 U.S. 184 (1958).

should the Board or the courts subsequently reverse or remand proceedings to afford an improperly denied opportunity for inspection and use of the subject memoranda, there is no restoration of the status quo. Wholly apart from the wasteful and unnecessary expenditure of time and effort in the initial proceeding, there is no provision in law for compensation from the Board for the necessarily large expenses incurred in the first hearing. Then would follow a second duplicating proceeding involving further expenditure of effort, time and funds. The avoidance of such duplicative and repetitive proceedings is an approved objective of our legal system.[7] It may be true that the integrity of the administrative process may forbid the granting of injunctive relief whenever it is alleged that agency procedures are irregular.[8] However, neither Sears nor the Chamber seeks a rule or result whereby any act of agency misconduct would give rise to an injunction of its proceedings. Rather, a distinction should be drawn between two forms of alleged administrative irregularity. Where the agency's misconduct arises in connection with some act or decision which is entrusted to agency discretion, there is some warrant for concluding, as the court below did, that ". . . this is a risk of litigation that is inherent in society . . .". However, where the agency's misconduct involves its refusal to obey an express statutory command promptly to do a specific act, as is involved in this case, and that refusal necessarily or inherently adversely affects the parties before it for the reasons previously given, then the agency can no longer state "the integrity of the administrative process" as a basis for resisting interruption of its proceedings.

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[7] *UAW* v. *Scofield*, 382 U.S. 350 (1965).

[8] *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938).

As a consequence of all of the factors discussed above, it follows logically and necessarily that the General Counsel's disobedience of his statutory mandate should give rise to the *presumption* that his malfeasance has caused the requisite injury to warrant injunctive relief. This would, of course, be a rebuttable presumption. However, the duty to illuminate those considerations which would rebut this presumption would be the burden of the General Counsel. Only if he seeks to sustain it would the parties be required to come forward affirmatively and additionally to establish that the requested injunctive relief is equitably warranted by extrinsic circumstances. Such a result is further in accord with the salutary proposition that the party who commits a wrong should be compelled to demonstrate that the effects of that wrong do not warrant relief, rather then place the burden upon the party who is aggrieved and who, in this context, lacks information to make a full case on its own behalf.

In the instant case, the court below imposed upon the wronged party the duty to show "irreparable harm". Despite the presence of the factors discussed above which do establish such harm, despite the agency's failure to come forward with mitigating considerations and despite the agency's failure to disclose the information sought during nearly a two year period after it was requested and in the face of the statutory command that the agency do so "promptly", the court below granted the General Counsel's motion for summary reversal of the district court's decision and order enjoining the agency's proceedings. In light of the considerations advanced here, this Court is urged to reverse the decision below.

CONCLUSION

Absent injunctive relief pending a district court's decision on a Freedom of Information Act claim, administrative agencies could, by delay or inaction, withhold information subject to disclosure under the Act until its usefulness in the administrative proceeding had long since expired. In *Bannercraft*, this Court will consider (and we believe uphold) the district courts' jurisdiction to enjoin administrative proceedings pending agencies' compliance with its affirmative obligations under the Freedom of Information Act. Assuming, *arguendo*, that the Court recognizes this jurisdiction, it is of the utmost importance that the jurisdiction thereby confirmed not be rendered nugatory by imposing, as a condition to providing such injunctive relief, a burden upon aggrieved parties to agency proceedings which is not only difficult, but nearly impossible, to sustain. Absent the sensible allocation of the burden of proof asserted here and by the petitioner, the jurisdiction of district courts to enjoin administrative proceedings pending an agency's compliance with the Freedom of Information Act will generally be unavailable to aggrieved parties even under the most compelling circumstances. If the benefits which Congress intended to confer by the Freedom of Information Act are not to be lost, this Court should grant the petition.

For the reasons stated above, together with those previously cited and argued by the petitioner, the Court is urged to grant the petition for writ of certiorari herein.

Respectfully submitted,

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SUPREME COURT, U. S.

JUN 7 197

MICHAEL RODAK, JR.,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972.

No. 72-1503

SEARS, ROEBUCK AND CO., ON ITS OWN BEHALF AND ON BEHALF OF OTHER CHARGING PARTIES UNDER THE NATIONAL LABOR RELATIONS ACT,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD AND EUGENE G. GOSLEE, ACTING GENERAL COUNSEL, IN HIS OWN BEHALF AND AS AGENT FOR THE NATIONAL LABOR RELATIONS BOARD,

Respondents.

REPLY TO MEMORANDUM IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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The Memorandum in Opposition contains several erroneous assertions which require a brief response:

1. The Memorandum (pp. 2-3) assumes that "Sears' basic contention is that the withholding of information by an agency in violation of the Freedom of Information Act results in such irreparable injury that the agency proceeding must be enjoined until the information is furnished, even though there are other adequate means for redressing that wrong." This assertion is incorrect. *First,* review was sought so that this Court could resolve the important question as to when the withholding of

information does constitute irreparable injury.[1] Sears did not argue that, in every such case, there is automatically irreparable injury; that test would be no more desirable than the converse standard adopted by the Court of Appeals which would virtually limit irreparable injury to Renegotiation Board proceedings. The correct criteria, in Sears' view (petition p. 2), is that the failure to properly produce requested documents establishes, as a matter of law, only a *prima facie* showing of irreparable injury. The agency would still be able to demonstrate—as it did not do here—that, in the circumstances involved, injunctive relief would materially prejudice the rights of the parties in the administrative proceeding or would otherwise be inappropriate. Cf., e.g., *Boys Markets, Inc.* v. *Retail Clerks Local 770*, 398 U. S. 235, 253-4 (1970). The issue, in any event, is one which, for the reasons set fort in the petition, warrants determination by this Court.

Second, Sears did not contend that the failure to promptly produce public documents could, apart from the exercise of a district court's equitable powers, be redressed in any other manner. There is, in fact, as described in the petition (pp. 9-10), no administrative or other remedy available to Sears, or a similarly-situated party before the Board, which would provide an adequate remedy to suffice for the refusal to timely comply with the requirements of the Freedom of Information Act.[2] It

1. This is a recurring issue (see *Wellman Industries, Inc.* v. *N. L. R. B.*, ... F. Supp. ...., 82 LRRM 2857 (No. 73-74) (D. C. S. C. Feb. 23, 1973); *Local 705, Truck Drivers* v. *NLRB*, ... F. Supp. ...., 82 LRRM 3014 (No. 94-73) (D. C. D. C. March 27, 1973); *Elsing Mfg. Co.* v. *NLRB*, ... F. Supp. ...., 83 LRRM 3054 (No. 73-30) (D. C. E. D. Okla., April 4, 1973); *Fire Alert* v. *NLRB* (No. C4782) (D. C. Col. 1973). Its national importance is underscored by the position taken by the Chamber of Commerce of the United States, demonstrated by its *amicus* brief filed in support of Sears' position.

2. Cf., e.g., *American Communications Association* v. *U. S.*, 298 F. 2d 648, 650-1 (2nd Cir. 1962), where the court noted: "Al-

is this absence of any alternative means of redress which distinguishes the instant case from *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41 (1938)[a] and obviates the normal review procedure of labor cases provided for in Section 10(e) and (f) of the National Labor Relations Act.

2. The Memorandum (p. 4) is also incorrect in claiming that *Sears, Roebuck and Co.* v. *NLRB*, 433 F. 2d 210 (6th Cir. 1970), supports the decision below. In that case, as the District Court recognized here (Pet. for Cert., p. A9), the Board's decisional processes, rather than rights arising under the Freedom of Information Act, were at issue; "the form of relief which the plaintiff [there sought] would result in early judicial review of a Board decision on permissible discovery, not an order to produce records." 433 F. 2d at 211. Here, however, as in *The Renegotiation Board* v. *Bannercraft Clothing Company*, No. 72-822, there is no attempt to review administrative decisional processes nor obtain an appellate ruling as to the merits of any agency ruling. The controlling precedent, therefore, is *Skinner & Eddy Corp.* v. *United States*, 249 U. S. 557 (1919), where district courts were held to have jurisdiction to restrain agency action where, *inter alia*, there is "no *effective* way of presenting the claim of invalidity at a later date." (emphasis added.) See also *Jewel Companies, Inc.* v. *F. T. C.*, 432 F. 2d 1155 (7th Cir. 1970). It is, indeed, the conflict between the Seventh Circuit's decision in *Jewel*, and the District

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though 47 U. S. C. A. § 405 permits any evidence to be taken at the discretion of the commission on a rehearing at the petition of a non-party, this is not an effective substitute for the right to adduce evidence, to cross-examine witnesses, and to present arguments at the initial hearing."

3. Moreover, contrary to the Solicitor General's assertion, *Myers* did not involve nor was it intended to govern a claim of illegal procedure or a denial of an "opportunity to introduce evidence" (303 U. S. at 45), let alone a violation of an independent statutory right as here.

of Columbia Circuit's decision in this case, as well as the different standards of irreparable injury articulated in those two cases, which, in addition to the reasons set forth in the petition, make the question here presented an appropriate one for review by this Court.

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MICHAEL ROD

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Subsequent to the filing of the petition and reply in this case, the Solicitor General submitted his brief in the *Renegotiation Board* v. *Bannercraft Clothing Company, Inc.*, No. 72-822, and this Court declined on June 11, 1973 to review *H. Kessler & Co.* v. *E.E.O.C.*, No. 72-1329. Both of these developments are significant in the present case.

1. The Solicitor General's brief in *Bannercraft* clearly recognizes, directly contrary to his assertion in the memorandum in opposition here (p. 7), that the questions presented in *Bannercraft* and the instant case are necessarily intertwined. That brief (p. 24, n. 21) in fact, acknowledges that the instant case raises "the same issue" as that presented in *Bannercraft*. The brief (p. 18, n. 17) further admits "the plaintiff's need for the documents in *Sears might have been greater* than that of the respondents" in *Bannercraft* (emphasis added). The memorandum in opposition as well as the Board in the proceedings below in this case, however, had theretofore taken a dramatically opposite view, i.e., that Sears' need, in contrast to that of Bannercraft, was not sufficient to warrant equitable relief. Similarly, the Solicitor General in *Bannercraft* argues that the injunction there was designed only "to aid the respondents . . . [and] not to further the public interest in disclosure of government information" (p. 22); that the injunction there would delay administrative proceedings and cause harm to the government (p. 23); and that the injunction there was improper because it was not clear that the documents sought were required to be made available under the Freedom of Information Act (pp. 25-6 and n. 25). In the present case, however, *none* of these considerations exist. The District Court found, and the Court of Appeals did not disturb, that the disclosure sought here would inure to the benefit of all members of the public (App. to Pet., p. A10, n. 1; p. A15), that the injunction issued would not unduly delay the administrative proceedings or harm the other parties thereto (App. to Pet., p. A9), and that it was probable that Sears was entitled to the controverted information under the Information Act (App. to Pet., pp. A4 and A10-15). Nevertheless, the Court below granted an injunction in *Bannercraft* and declined to do so in the present case. The issues

presented in this case, accordingly, are inseparable from those raised in *Bannercraft*,[1] and likely to recur, unless resolved, should this Court affirm the decision below in that case. The instant case warrants, therefore, as shown by the petition, resolution by this Court in conjunction with *Bannercraft*.

2. This Court's denial of the petition for writ of certiorari in *Kessler* was no doubt based, at least in part, on the Solicitor General's assertion that the right of the charging parties in that case to obtain investigative information, otherwise required to be confidential, from the Equal Employment Opportunity Commission was warranted because a contrary rule would "seriously impede" the Commission's conciliation process, i.e., "a party cannot be expected to agree to a settlement of his claims if information bearing on the claim is withheld from him." Memorandum in Opp. in No. 72-1329, pp. 2-3. Nevertheless, the Solicitor General has again taken a contrary view in this case: that analagous settlement and litigation efforts can be conducted by the Labor Board notwithstanding that charging parties before that Agency have been deprived of information to which they are entitled under the Information Act. This anomalous result, should the decision below be allowed to stand, is further reason for review by this Court.

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[1] The Solicitor General's brief in *Bannercraft* (pp. 27-35), premised on his position that cases arising before the Renegotiation Board and the National Labor Relations Board should be treated alike for purposes of the questions here involved (p. 18), also discusses at length, the *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, issue presented in the instant case. See Pet. for Cert., pp. 8-10. This further demonstrates the inseparability, and need for joint resolution of this case with *Bannercraft*.

The Petition, for the reasons set forth therein and in the reply, should be granted.

Respectfully submitted,

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MICHAEL ROBAK, J

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972.

No. 72-1503

SEARS, ROEBUCK AND CO., ON ITS OWN BEHALF AND ON BEHALF OF OTHER CHARGING PARTIES UNDER THE NATIONAL LABOR RELATIONS ACT, *Petitioner,*

vs.

NATIONAL LABOR RELATIONS BOARD AND EUGENE S. GOSLEE, ACTING GENERAL COUNSEL, IN HIS OWN BEHALF AND AS AGENT FOR THE NATIONAL LABOR RELATIONS BOARD, *Respondents.*

SUPPLEMENT TO PETITION FOR WRIT OF CERTIORARI

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SUPPLEMENT TO PETITION FOR WRIT OF CERTIORARI

Petitioner Sears Roebuck and Co. (hereafter "Sears") will herein advise the Court of related developments, subsequent to the filing of the petition for certiorari in the instant matter.

The case at bar arises from the Court of Appeals' reversal of a preliminary injunction enjoining the General Counsel of the National Labor Relations Board from proceeding with an unfair labor practice proceeding, which had been initiated by Sears, until Sears had an opportunity to evaluate certain public documents. The pending petition raises, in essence, two questions: *first*, the capacity of a district court to alleviate the irreparable violation of the public's right to the prompt production

of public documents under the Freedom of Information Act (5 U. S. C. § 552) by temporarily enjoining the commencement of an administrative proceeding; and *second*, the inter-relationship of the Information Act and the judicial review provisions of the various administrative agencies, especially Section 10(f) of the National Labor Relations Act (29 U. S. C. § 160(f)). Subsequent to the filing of the petition by Sears, the Court of Appeals for the District of Columbia Circuit affirmed, in a decision appended hereto, the District Court's holding, on the merits of the information request, that Sears was correct "on all points." Pet. App. A, p. A4. This holding should now dispel any doubts as to the clarity of General Counsel's violation of the Information Act. In such a case, where, as here, there is an absence of countervailing equities, the District Court should have been permitted to issue temporary relief to effectuate the Information Act's mandate "that production [of public material] be 'prompt.'" *National Cable Tele. Ass'n.* v. *F. C. C.*, 479 F. 2d 183, 188, n. 11 (D. C. Cir. 1973) Review by this Court, therefore, is necessary, as set forth in the petition, to validate the public rights granted by the Information Act.

Respectfully submitted,

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APPENDIX.

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit
September Term, 1972

No. 72-1870

SEARS, ROEBUCK & CO., on its own behalf and on behalf of other charging parties under the National Labor Relations Act

vs.

NATIONAL LABOR RELATIONS BOARD and EUGENE G. GOSLEE, Acting General Counsel, on his own behalf and as agent for the National Labor Relations Board, Appellants

Appeal from the United States District Court for the District of Columbia.

Civil Action No. 1571-71

Before WILBUR K. MILLER, *Senior Circuit Judge*, and WRIGHT and ROBB, *Circuit Judges*.

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel. While the issues presented occasion no need for an opinion, they have been accorded full consideration by the court. *See* Local Rule 13(c).

On consideration of the foregoing, it is Ordered and Adjudged by this court that the judgment of the District Court appealed from herein is hereby affirmed on the basis of the opinion of District Judge Howard F. Corcoran, *see Sears, Roebuck & Co.* v. *NLRB*, D. D. C., 346 F. Supp. 751 (1972). *See also Grum-*

man Aircraft Engineering Corp. v. *Renegotiation Board,* . . . .
U. S. App. D. C. . . . ., ... F. 2d . . . . (No. 71-1730, de
cided July 3, 1973).

It is Further Ordered by this court that the stay ordered by
the District Court is hereby dissolved.

Per Curiam
For the Court:
/s/ HUGH E. KLINE
Hugh E. Kline
Clerk